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No. 96-871

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

STATE OIL COMPANY, *Petitioner,*

v.

BARKAT U. KHAN and KHAN & ASSOCIATES, *Respondents.*

On Writ of Certiorari to the
United States Court of Appeals for the Seventh Circuit

BRIEF FOR THE COALITION FOR FAIR CONSUMER PRICING, AS *AMICUS CURIAE* SUPPORTING PETITIONER

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Brinker International, Inc.
Burger King Corporation
Dresser Industries, Inc.
Dunkin' Donuts, Inc.
Eastman Kodak Co.
General Motors Corp.
The Goodyear Tire & Rubber Company
Great American Cookie Company, Inc.
Harley-Davidson Motor Co.
Koch Industries, Inc.
Konica Business Machines U.S.A., Inc.
Midas International Corporation
Miller Brewing Co.
Milliken & Company
Motel 6 Operating L.P.
Norwalk Furniture Corporation
PACCAR Inc.
The Pillsbury Company
Saab Cars USA, Inc.
Sears, Roebuck & Co.
The Stroh Brewery Company
The Southland Corporation
TCBY Enterprises, Inc.
The Toro Company
Wendy's International, Inc.

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INTEREST OF THE *AMICUS CURIAE*

The Coalition For Fair Consumer Pricing ("Coalition") respectfully submits this brief as *amicus curiae* pursuant to Rule 37 of the Rules of the Supreme Court. The Coalition supports the petitioner's position that the agreement between petitioner and respondents should not be a *per se* violation of the Sherman Act, 15 U.S.C. § 1 *et seq.* (1994).

The Coalition is an organization formed for the purpose of submitting this *amicus* brief. The Coalition's membership consists of a broad cross-section of corporate America, including both small and large manufacturing, retailing, and franchising companies. The members of the Coalition are: AFC Enterprises, Inc. (owner of the Popeyes Chicken & Biscuits and Church's Chicken franchise systems); Allied-Domecq Retailing International (owner of Dunkin' Donuts, Inc. and Baskin-Robbins Incorporated); Brinker International, Inc.; Burger King Corporation; Dresser Industries, Inc.; Eastman Kodak Co.; General Motors Corp.; The Goodyear Tire & Rubber Company; Great American Cookie Company, Inc.; Harley-Davidson Motor Co.; Koch Industries, Inc.; Konica Business Machines U.S.A., Inc.; Midas International Corporation; Miller Brewing Co.; Milliken & Company; Motel 6 Operating L.P.; Norwalk Furniture Corporation; PACCAR Inc.; The Pillsbury Company; Saab Cars USA, Inc.; Sears, Roebuck & Co.; The Stroh Brewery Company; The Southland Corporation; TCBY Enterprises, Inc.; The Toro Company; and Wendy's International, Inc.

The Coalition's interest in this case stems from the concern of its members that the current *per se* prohibition on maximum vertical price fixing agreements deprives consumers of the full benefit of vigorous interbrand competition among providers of goods and services. The

automatic prohibition on maximum vertical price fixing forces the members to use marketing and distribution practices which are less effective and more costly to implement than maximum vertical price fixing agreements. Accordingly, the Coalition and consumers have a vital interest in abolishing the *per se* prohibition on maximum vertical price fixing, and in having the legality of maximum vertical price fixing agreements evaluated on a case-by-case basis under the rule of reason approach.

SUMMARY OF THE ARGUMENT

The Court is presented in this case with an opportunity to modify an antitrust principle with which businesses, judges, and academics have struggled since it was first established in *Albrecht v. Herald Co.*, 390 U.S. 145 (1968). The *per se* rule against maximum vertical price fixing agreements prevents manufacturers and other upstream suppliers from imposing a price ceiling on their dealers, franchisees, distributors, and other downstream resellers. As a result, upstream suppliers are prohibited from engaging in a practice that would tend to result in *lower* prices to consumers. This outcome is the antithesis of what the antitrust laws were designed to accomplish -- an increase in competition resulting in lower consumer prices.

The legality of most trade restraints is determined by applying the rule of reason analysis, which considers the actual effects of the restraint; only the most pernicious conduct is condemned without the benefit of an analysis of the effects of the conduct in the market. Maximum vertical price fixing is not pernicious, and the Court, in the years since *Albrecht*, has recognized that maximum vertical price fixing has procompetitive effects. Indeed, antitrust scholars and commentators are virtually unanimous in their

conclusion that the significant procompetitive effects of maximum vertical price fixing justify applying the flexible rule of reason approach to this practice.

The problems with the *per se* prohibition on maximum vertical price fixing are most evident in franchise and dealership systems, where consumers have come to expect uniformity of the essential features (such as service and promotional pricing) among franchisees/dealers operating under a common trademark. Because maximum vertical price fixing has been treated as *per se* unlawful, upstream suppliers have had to resort to other, less efficient, methods to restrain potential overcharging by their dealers. These other methods, while lawful, are often impracticable and insufficient to benefit consumers. Moreover, these methods result in higher distribution costs throughout the United States.

For all of these reasons, maximum vertical price fixing arrangements should be analyzed under the rule of reason approach.

ARGUMENT

MAXIMUM VERTICAL PRICE FIXING SHOULD NOT BE *PER SE* UNLAWFUL.

The main issue in this case -- whether maximum vertical price fixing should remain *per se* unlawful, or whether its competitive effects should be analyzed under the rule of reason -- is one which should be resolved in favor of the rule of reason standard. The *per se* prohibition on maximum vertical price fixing has been almost universally criticized by antitrust and industrial organization scholars. Even assuming that *per se* liability were justified in the past

based on the best information then available to the Court, it now should be clear that neither economic theory nor empirical evidence can support the continued application of the *per se* standard in this context. For this reason, the Seventh Circuit in this case, while finding itself compelled to follow the *per se* standard enunciated in *Albrecht v. Herald Co.*, 390 U.S. 145 (1968), made it clear that *Albrecht* "should be overruled." *Khan v. State Oil Co.*, 93 F.3d 1358, 1363 (7th Cir. 1996). The Coalition urges this Court to follow the Seventh Circuit's recommendation and apply the more flexible rule of reason standard to maximum vertical price fixing agreements.

I. The Court Should Overrule *Albrecht*.

The *Albrecht* case "is the only case in which the Court has confronted an unadulterated vertical, maximum price-fixing arrangement" and ruled on the legality of that practice. *Atlantic Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 336 n.6 (1990). The application of the *per se* standard in *Albrecht* does not fit within the Court's traditional antitrust jurisprudence and is an anomalous decision that the Court should now rectify.

The Court has consistently emphasized that the favored standard for assessing the legality of most restraints of trade is the rule of reason, which permits an analysis of the actual effect of the restraint (procompetitive, anticompetitive, or neutral) on competition. *See, e.g., Business Electronics Corp. v. Sharp Electronics Corp.*, 485 U.S. 717, 723, 726 (1988) ("Ordinarily, whether particular concerted action violates § 1 of the Sherman Act is determined through case-by-case application of the so-called rule of reason . . . [T]here is a presumption in favor of a rule-of-reason standard"). The *per se*, or automatic,

condemnation of a practice should occur "only for conduct that is manifestly anticompetitive . . . that is, conduct that would always or almost always tend to restrict competition and decrease output." *Id.* at 723 (citations and quotations omitted). The Court has observed that, especially when reviewing vertical restraints, "departure from the rule-of-reason standard must be based upon demonstrable economic effect rather than . . . upon formalistic line drawing." *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 58-59 (1977).

Whatever the reasoning may have been in the past, today the application of a *per se* liability standard to maximum vertical price fixing can be viewed only as "formalistic line drawing." This Court has expressly recognized the procompetitive aspects of maximum vertical price fixing. In *Atlantic Richfield Co. v. USA Petroleum Co.*, the Court conceded that, at least in the context of exclusive territories assigned to dealers (who might be able to exploit consumers by acting as local monopolists within their territories), "[t]he procompetitive potential of a vertical maximum price restraint is more evident now than it was when *Albrecht* was decided, because exclusive territorial arrangements and other nonprice restrictions were unlawful *per se* [when *Albrecht* was decided] in 1968. . . . These [exclusive territory] agreements are currently subject only to rule-of-reason scrutiny, making monopolistic behavior by dealers more likely." 495 U.S. at 343 n.13. The Court concluded its recent analysis of maximum vertical price fixing by noting eight commentators who "have identified procompetitive effects of vertical, maximum price fixing." *Id.*

Following this analysis, the Court of Appeals for the Seventh Circuit in this case stated that the continued validity

of *Albrecht* is an open question because, after *Albrecht*, this Court reversed its previous view of exclusive dealer territories, recognizing that they might be procompetitive (citing *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36). The Seventh Circuit noted that "a price ceiling is a natural and procompetitive incident to a scheme of territorial exclusivity," and that, now that territorial exclusivity is a common practice and no longer *per se* unlawful, the imposition of a price ceiling certainly should not be subject to a standard of automatic illegality. *Khan v. State Oil Co.*, 93 F.3d at 1363.

The *per se* prohibition of maximum vertical price fixing is not a rule that is deeply embedded in antitrust jurisprudence. Nor is it a rule that has much support in the academic community. Moreover, the lower courts increasingly are analyzing a variety of pricing practices under a rule of reason.[1/] The Court should recognize the modern thinking by permitting the lower courts to evaluate the competitive effects of maximum vertical price fixing on a case-by-case basis -- *i.e.*, under a rule of reason analysis.

II. Economic Theory Does Not Support the Application of a Rule of *Per Se* Illegality to Maximum Vertical Price Fixing.

The *per se* condemnation of maximum vertical price fixing has little economic justification. Many antitrust scholars and economists have concluded that maximum vertical price fixing is, at worst, competitively neutral and, at best, procompetitive. The procompetitive justification for

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[1/] For a discussion of the trend in favor of a rule of reason analysis, see notes 3-8 *infra*.

this practice is based on the recognition that, in a competitive market, there is a competitive level of price markups that is possible when goods are distributed from upstream suppliers through dealers or distributors to consumers. The total price markup is divided between the upstream supplier's markup and the dealer's markup. When there is imperfect competition -- such as when the dealer has an exclusive territory, the product being distributed is distinctive, the consumer has imperfect information about prices at other locations, or the consumer has transport costs in traveling to or receiving the product from other locations -- the dealer is able to exercise a form of market power by raising prices above the competitive level. By establishing a price ceiling for its dealers, the upstream supplier is able to prevent its dealers from fully exploiting their superior position at the expense of consumers and the upstream supplier. Thus, by imposing a maximum resale price on its dealers, an upstream supplier is able to alleviate the problem of "double marginalization" or "successive monopolies," thereby resulting in lower prices to consumers and a higher volume of sales. *See Atlantic Richfield Co. v. USA Petroleum Co.*, 495 U.S. at 343 n.13; *Albrecht v. Herald Co.*, 390 U.S. at 157-58 (Harlan, J., dissenting); *Khan v. State Oil Co.*, 93 F.3d at 1362; Phillip E. Areeda, 8 Antitrust Law ¶ 1634 (1989); Roger D. Blair, *The Ghost of Albrecht: Caribe BMW, Inc. v. Bayerische Motoren Werke Aktiengesellschaft*, 40 Antitrust Bull. 205, 212-17 (1995); Kevin J. Arquit, *Resale Price Maintenance: Consumers' Friend or Foe?*, 60 Antitrust L. J. 447, 462-63 (1992); Roger D. Blair & Gordon L. Lang, *Albrecht After ARCO: Maximum Resale Price Fixing Moves Toward the Rule of Reason*, 44 Vand. L. Rev. 1007 (1991); Martin K. Perry & David Besanko, *Resale Price Maintenance and Manufacturer Competition For Exclusive Dealerships*, 39 J. Indus. Econ. 517 (1991).

This Court explained the benefits of maximum vertical price fixing in *Atlantic Richfield Co. v. USA Petroleum Co.*, where it stated that maximum vertical price fixing tends to "drive prices toward the level that would be set by intense competition, by prevent[ing] retailers or wholesalers from reaping monopoly or supercompetitive profits." 495 U.S. at 343 n.13 (quotations and citations omitted). Professor Areeda, who concluded that "*Albrecht's per se* condemnation of vertical price ceilings rests on unsupportable premises," Areeda, *supra*, at ¶ 1639, provides a clear and simple justification for allowing maximum vertical price fixing:

> A dealer, although small in absolute terms, may enjoy a considerable degree of monopoly power in its local market. Like any other monopolist, it is likely to restrict output and raise price, to the detriment of both the manufacturer and consumer. The detriment to the consumer is obvious: higher prices. The detriment to the manufacturer is equally clear: fewer sales. The manufacturer thus serves both his own interests and those of consumers by restraining the dealers' exercise of monopoly power and preventing dealers from profiting more than necessary for effective performance of the distribution function. This protects the public from price gouging.

Id. at ¶ 1636a.

Despite the widespread acceptance of this procompetitive analysis, the Court thus far has declined expressly to overrule the *per se* standard. In *Albrecht*, the

Court identified three anticompetitive possibilities that led it to criticize the practice of maximum vertical price fixing: (1) the price ceiling might be set too low for dealers to furnish necessary services; (2) sales might be channeled through only a few large or advantaged dealers; and (3) the practice might acquire the attributes of, or be used as a subterfuge for, an arrangement fixing minimum prices. *Albrecht v. Herald Co.*, 390 U.S. at 152-53; *see also Atlantic Richfield Co. v. USA Petroleum Co.*, 495 U.S. at 335-36. These concerns repeatedly have been addressed and dismissed by many authorities. *See, e.g.*, Areeda, *supra*, at ¶ 1635; John E. Lopatka, *Stephen Breyer and Modern Antitrust: A Snug Fit*, 40 Antitrust Bull. 1, 59-60 (1995); Blair, *supra*, at 218-20. As to the first anticompetitive possibility, it is not in the economic interest of an upstream supplier to set a price cap so low that retailers could not provide desirable services. In response to the second anticompetitive concern, it is not necessarily the case that larger retailers operate with greater efficiency than smaller, specialty shops; in any event, consumers are not likely to be injured if only the most efficient retailers survive. As to the third anticompetitive theory, if a maximum vertical price fixing agreement actually is a minimum vertical price fixing agreement in disguise, it will be governed by the standards applicable to minimum vertical price fixing.

In addition to these three theories of anticompetitive behavior, there is a concern that vertical price fixing (both maximum and minimum) could be used as a means of facilitating horizontal collusion among upstream suppliers or

dealers.[2] *See, e.g., Khan v. State Oil Co.*, 93 F.3d at 1367-68 (Ripple, J., concurring). According to the upstream collusion theory, vertical price fixing is used by upstream suppliers to establish a collusive wholesale price. By requiring members of the cartel to impose price restraints on their dealers, the upstream suppliers have an effective method of detecting cheating by the other cartel members. According to the dealer collusion theory, dealers induce their suppliers to enforce a collusive price through vertical price fixing. The dealers then are able to detect cheating and discipline dealers who cheat on the resale price. Recent empirical studies, however, demonstrate that horizontal collusion is not a significant explanation of vertical price fixing agreements. Pauline M. Ippolito & Thomas R. Overstreet, Jr., *Resale Price Maintenance: An Economic Assessment of the Federal Trade Commission's Case Against The Corning Glass Works*, 39 J. L. & Econ. 285 (1996); Pauline M. Ippolito, *Resale Price Maintenance: Empirical Evidence From Litigation*, 34 J. L. & Econ. 263 (1991).

Even if particular instances of maximum vertical price fixing might have anticompetitive effects, the rule of reason is the standard of analysis that is best equipped to assess those effects and to balance them against the procompetitive effects of maximum vertical price fixing that courts and commentators have recognized. "The alleged evils of maximum resale price limitations are either illusory or can be appropriately handled without *per se* condemnation." Areeda, *supra*, at ¶ 1635.

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[2] Agreements on price between or among competitors at either the upstream supplier or dealer level (*i.e.*, horizontal agreements) are, of course, *per se* offenses.

III. The *Per Se* Condemnation of Maximum Vertical Price Fixing Is Particularly Unsound When Applied To Franchise and Dealership Relationships.

For members of the Coalition who operate franchise and dealership networks, the application of a *per se* rule of illegality is particularly troublesome because the procompetitive benefits of maximum vertical price fixing are more pronounced in this context. *See generally* Roger D. Blair & Amanda K. Esquibel, *Maximum Resale Price Restraints in Franchising*, 65 Antitrust L. J. 157 (1996); Michael L. Denger, *Resale Pricing Issues In Distribution and Franchisor Operations*, 60 Antitrust L. J. 419 (1991). Franchisors frequently engage in system-wide, or at least regional, price promotions, and consumers have come to expect uniformity of the essential features in franchises generally. At least one court has recognized the importance of uniform pricing in franchise systems by holding that a franchisor has a legitimate interest in maintaining the credibility of its advertised promotional price, and that it, accordingly, "must be allowed to take reasonable measures to make sure the advertised price is not exceeded." *Jack Walters & Sons Corp. v. Morton Building, Inc.*, 737 F.2d 698, 708 (7th Cir.), *cert denied*, 469 U.S. 1018 (1984).

In franchise and dealership systems, it is common for franchisees/dealers to benefit from exclusive territories or marketing areas. Additionally, franchise and dealership systems generally operate under distinctive trademarks. To discourage dealers from exercising the marketing power which is the product of the above factors, upstream suppliers have employed a myriad of approaches to influence, but not control, dealer pricing. These marketing approaches have

included price restrictive cooperative advertising programs[3], direct price advertising[4], price supports and

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[3] Price restrictive cooperative advertising programs entail the granting of cooperative advertising payments or other compensation by an upstream supplier to dealers who advertise the upstream supplier's suggested retail price or no price at all. In *Nissan Antitrust Litigation*, 577 F.2d 910 (5th Cir. 1978), *cert. denied*, 439 U.S. 1072 (1979), the Fifth Circuit affirmed a jury verdict upholding, under the rule of reason, a cooperative advertising plan in which dealers received reimbursement from their upstream supplier only if their advertisements used the recommended retail price or no price at all. The court noted that the dealers were free to advertise at any price they chose, at their own expense, and were free to sell at any price. The FTC, in 1987, rescinded an earlier policy statement and adopted a rule of reason analysis for cooperative advertising programs. *Rescission of 1980 Statement of Policy Regarding Price Restrictions in Cooperative Advertising Programs*, 6 Trade Reg. Rep. (CCH) ¶ 39,057 (May 21, 1987). In explaining its new position regarding cooperative advertising programs, the FTC recognized that "[t]he fact that a distributional restraint may have an incidental effect on resale prices is not by itself enough to condemn the practice as *per se* unlawful. . . . [P]rice restrictive cooperative advertising programs are likely to be procompetitive or at least competitively neutral in most cases." *Advertising Checking Bureau, Inc.*, 109 F.T.C. 146, 147 (1987) (order modification). The FTC subsequently modified a series of old consent orders expressly to eliminate provisions that prohibited the conditioning of cooperative advertising allowances on use of the upstream supplier's suggested prices in advertisements. *See Onkyo U.S.A. Corp.*, Docket No. C-3092, 1996 FTC LEXIS 473 (FTC Oct. 24, 1996); *Pendleton Woolen Mills, Inc.*, Docket No. C-2985, 1996 FTC LEXIS 427 (FTC Sept. 30, 1996); *Interco Inc.*, Docket No. C-2929, 1995 FTC LEXIS 68 (FTC March 27, 1995); *Clinique Laboratories, Inc.*, 116 F.T.C. 126 (1993); *U.S. Pioneer Electronic Corp.*, 115 F.T.C. 446 (1992); *The Magnavox Co.*, 113 F.T.C. 255 (1990).

[4] Upstream suppliers have been permitted to advertise suggested resale prices directly to final consumers, even though this practice might have the practical effect of limiting the pricing freedom of dealers as a

competitive allowances[5], wholesale price formulae[6], joint

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result of market forces. Price advertising by upstream suppliers is frequently used in their promotional campaigns, where the promotion of a uniform retail price is a key element of the campaign. Typically, the upstream supplier will disavow any intention to control the actual sales price of its dealers by including a "participating dealer" limitation in advertisements. This practice is therefore akin to a "suggested resale price," which is subject to rule of reason analysis. *See, e.g., Acquaire v. Canada Dry Bottling Co. of N.Y., Inc.*, 24 F.3d 401, 411 (2d Cir. 1994) (provision by manufacturer of suggested wholesale price to retailers was not vertical price fixing, even though retailers would resist paying a higher price to the wholesaler than the suggested wholesale price); *Jack Walters & Sons Corp. v. Morton Building, Inc.*, 737 F.2d at 707 ("it is perfectly lawful for a manufacturer to advertise his product to the ultimate consumer, whether or not he sells directly to the consumer, and to mention in that advertising the retail price of the prod[illegible]").

[5] Many upstream suppliers provide price reductions or rebates to dealers on the condition that the discounts are passed through to consumers. Most lower courts have recognized that upstream suppliers who are lowering their prices have a legitimate interest in making sure that the dealer is not pocketing this "price support" or "competitive allowance" instead of passing it on. Accordingly, as long as dealers are free to determine their resale prices, price support programs repeatedly have been evaluated and upheld under a rule of reason analysis. For example, in *AAA Liquors, Inc. v. Joseph E. Seagram & Sons*, 705 F.2d 1203 (10th Cir. 1982), *cert. denied*, 461 U.S. 919 (1983), the Tenth Circuit upheld a program in which the upstream supplier, Seagram, granted discounts to a wholesaler on the condition that they be passed on to certain retailers. The wholesaler was free to decline the discount and retain complete pricing freedom, or to accept the discount and "pass it through" to retailers. The court concluded that "[a] supplier who grants discounts to a retailer to permit the retailer to charge competitive prices has a legitimate interest in making sure the retailer receiving the discount 'is not pocketing the price support instead of passing it on to consumers.'" *Id.* at 1206 (quoting *Lehrman v. Gulf Oil Corp.*, 464 F.2d 26, 40 (5th Cir.), *cert. denied*, 409 U.S. 1077 (1972)). *See also*

price promotions[7], and price strategies based on external

Acquaire v. Canada Dry Bottling Co. of N.Y., Inc., 24 F.2d at 410-11; *Jack Walters & Sons Corp. v. Morton Building, Inc.*, 737 F.2d at 707-08; *Lewis Serv. Center, Inc. v. Mack Trucks, Inc.*, 714 F.2d 842 (8th Cir. 1983), *cert. denied*, 467 U.S. 1226 (1984).

[6] The lower courts have applied a rule of reason analysis to wholesale pricing formulae (*i.e.*, where the upstream supplier's wholesale price is based on the dealer's resale price) as long as the retailer has been permitted to derive substantial benefit when it deviates from the upstream supplier's suggested resale price. For example, in *Martindell v. News Group Publications*, Inc., 580 F. Supp. 330 (E.D.N.Y. 1984), the court upheld the legality of a price formula in which a newspaper publisher charged its distributors the greater of: (1) a fixed wholesale price if the distributor resold newspapers at no greater than the publisher's suggested resale price; or (2) a percentage of the actual resale price if the distributor resold newspapers for more than the suggested resale price. The court recognized that this formula permitted distributors to derive substantial benefits from their pricing decisions. *See General Cinema Corp. v. Buena Vista Distribution Co.*, 681 F.2d 594 (9th Cir. 1982) (where a movie supplier charged its dealers a fixed percentage of the greater of the suggested resale price or the actual resale price of ticket sales, the court found that this system did not induce dealers to set resale prices at non-competitive levels and therefore did not constitute vertical price fixing).

[7] Upstream suppliers and dealers have a strong interest in jointly developing and promoting their products, including joint promotions relating to prices. The lower courts have recognized the desirability of this activity and, so long as dealers retain pricing discretion, have applied a rule of reason to joint promotional conduct. *See Nissan Antitrust Litigation*, 577 F.2d 910 (5th Cir. 1978), *cert. denied*, 439 U.S. 1072 (1979) (not unreasonable *per se* to anchor advertised prices to upstream supplier's suggested resale price); *United States v. Pittsburgh Area Pontiac Dealers, Inc.*, 1978-2 Trade Cas. (CCH) ¶ 62,233 (W.D. Pa. 1978) (consent decree with dealer association permitting joint

factors.[8] These practices have themselves occasionally been challenged as *per se* unlawful vertical price fixing but, in recognition of the procompetitive benefits offered to consumers by the practices, the lower courts generally have treated them under the rule of reason approach. See notes 3 - 8 *supra*. However, upstream suppliers must devote substantial resources to develop, administer, and enforce these programs.

Direct control over a franchisee/dealer's maximum prices, rather than indirect influence through these various practices, offers the same benefits as the foregoing practices at much lower cost. Moreover, many of these marketing approaches are impracticable or insufficient to benefit

advertising of upstream supplier's suggested retail prices); *cf. Williams v. I.B. Fisher Nevada*, 999 F.2d 445 (9th Cir. 1993) (recognizing that joint activity by franchisor and franchisee cannot provide the basis of a conspiracy because franchisor and franchisee were "common enterprise" and, therefore, were incapable of conspiring with one another).

[8] Upstream suppliers might desire to position their goods and services within a specific market niche or price range at the dealer level. While the specification of prices or price ranges by the upstream supplier might be viewed as vertical price fixing, a requirement that dealers price the goods or services in accordance with certain external factors, that are not within the upstream supplier's control, should be subject to a rule of reason standard. For example, a requirement that dealers price goods or services in relation to the price of a competitor's goods or services (*e.g.*, at a price no greater than the price of competing products) is procompetitive and should not automatically be deemed unlawful. *Cf. Blue Cross & Blue Shield United of Wis. v. Marshfield Clinic*, 65 F.3d 1406, 1415 (7th Cir. 1995) (upstream supplier's policy of basing sales prices to one group of customers upon sales prices to another group of customers "is not price-fixing" and "is the sort of conduct that the antitrust laws seek to encourage"), *cert. denied*, -- U.S. --, 116 S.Ct. 1228 (1996).

consumers, and they are no substitute, in terms of economic efficiency, for maximum vertical price fixing. Maximum vertical price fixing is simply a superior method of bringing lower retail prices to the consumer.

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Although the case for a rule of reason approach is more evident in franchise and dealership systems than in other vertical relationships, it should be clear that the rule of reason approach is warranted for maximum vertical price fixing in all vertical settings. It is time to recognize that the application of the rule of reason to maximum vertical price fixing will benefit consumers and the efficient functioning of the distribution system.

CONCLUSION

The antitrust laws are a "consumer welfare prescription." *Reiter v. Sonotone Corp.*, 442 U.S. 330, 343 (1979). They are designed to "increase economic efficiency and render markets more, rather than less, competitive." *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.*, 441 U.S. 1, 19-20 (1979). There is now a virtual consensus that the *per se* prohibition on maximum vertical price fixing serves neither of these goals. Accordingly, The Coalition For Fair Consumer Pricing respectfully urges the Court to declare that maximum vertical price fixing arrangements are to be evaluated under the more flexible rule of reason standard.

Respectfully submitted,

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